Supreme Court
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CASE NO. 93-300

THE SUPREME COURT OF THE UNITED STATES
1993 TERM

SOUTHWEST WATER WELLS, INC., a Florida corporation,

Petitioner,

v.

GARNEY COMPANIES, INC., a Missouri corporation, individually and as joint venturer doing business as WAUGH/GARNEY JOINT VENTURE a joint venture, and AMERICAN HOME ASSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

WHETHER A FEDERAL DISTRICT COURT SITTING IN DIVERSITY VIOLATES THE DOCTRINE ESTABLISHED BY ERIE R. v. TOMPKINS, 304 U.S. 64 (1938), IN DISMISSING A FLORIDA RESIDENT'S LAWSUIT, SOLELY ON GROUNDS OF THE FEDERAL COMMON LAW OF FORUM NON CONVENIENS, WHERE FLORIDA'S STATE COMMON LAW OF FORUM NON CONVENIENS, AS WELL AS FLORIDA'S STATE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS, FORBIDS DISMISSAL OF THAT SAME ACTION.

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II. CORPORATE DISCLOSURE STATEMENT.
Sup. Ct. R. 14.1(b), 29.1.

No parent or subsidiary company is to be listed under Supreme Court Rule 29.

III. GROUNDS INVOKING JURISDICTION.
Sup. Ct. R. 14.1(e).

Petitioner seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit dated March 10, 1993. See infra p.9. The court of appeals denied rehearing of its judgment on May 20, 1993. See infra p. 10.

Petitioner believes that 28 U.S.C. § 1254 (1993 Supp.) confers jurisdiction upon this Court.

IV. CONSTITUTIONAL PROVISION INVOLVED.
Sup. Ct. R. 14.1(f).

Fla. Const. art. I, § 21 (1968): "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

V. STATEMENT OF CASE.
Sup. Ct. R. 14.1(g).

A. Factual Background.

In 1990, petitioner, Southwest Water Wells, Inc. ("Southwest"), a Florida resident and corporation, contracted with the Waugh/Garney Joint Venture ("Waugh/Garney"), to

drill wells in the Commonwealth of the Bahamas. Waugh/Garney was a joint venture between Garney Companies, Inc. ("Garney"), a Missouri corporation, and Waugh Construction, Ltd. ("Waugh"), a Bahamian corporation. Following Southwest's performance, a payment dispute arose between Southwest and Waugh/Garney.

B. Procedural Background.

On July 3, 1991, Southwest filed suit against Garney, Waugh/Garney, and the payment surety on the project, American Home Assurance Company, in Florida state court for breach of contract and enforcement of a suretyship agreement. Defendants removed the case to the United States District Court for the Middle District of Florida on the basis of diversity of citizenship of the parties[1] and, once in federal court, moved for dismissal based upon the federal common law of forum non conveniens. On May 28, 1992, the district court granted Defendants' motion and dismissed Southwest's lawsuit. Southwest timely appealed the district court's judgment and, on March 10, 1993, the Eleventh Circuit Court of Appeals entered judgment affirming the district court.

VI. ARGUMENT FOR ALLOWANCE OF WRIT. Sup. Ct. R. 14.1(j).

A. Circuit decisions conflict.

In Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), an opinion written by Judge Learned Hand, the Second Circuit required observance of the state, rather than federal, common law rule essentially identical to forum non conveniens.

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[1] 28 U.S.C. § 1332 (1993 Supp.).

However, Sibaja v. Dow Chemical, 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985), and In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987), require observance of the federal common law rule. Thus, this Court's jurisdiction is necessary to bring uniformity to the Erie doctrine.

B. Eleventh Circuit decision conflicts with Supreme Court's Hanna decision.

Sibaja follows the federal common law of forum non conveniens and thereby violates this Court's directives because the federal rule (1) encourages forum shopping by promoting removal, and (2) promotes the inequitable administration of laws by allowing dismissal of an action which, but for diversity of citizenship between the litigants, would proceed to judgment in Florida's courts. See Hanna v. Plumer, 380 U.S. 460 (1965). Further, the Sibaja analysis is expressly based upon forbidden "talismanic" and "common sense" interpretations of the words "substantive" and "procedural," in violation of this Court's express prohibitions of such analyses. See Hanna v. Plumer, 380 U.S. 460, 465, 466; see also Guaranty Trust v. York, 326 U.S. 99 (1945). Thus, this Court's jurisdiction is warranted in order to enforce conformity with this Court's clear mandates.

C. This question is a matter of exceptional importance.

1. The instant question represents unfinished business of Piper.

This Court, in Piper Aircraft v. Reyno, 454 U.S. 235 (1981), clarified the federal common law of forum non conveniens without answering the more fundamental question of whether the federal or state common law should apply in the first instance. In Piper, this Court stated:

> The Court did not decide [the issue of whether, under Erie, state or federal law of forum non conveniens applies in a diversity case] because the same result would have been reached in each case under federal or state law.

Id. at 249 n. 13.

However, Florida's common law of forum non conveniens, unlike that of the forum state in Piper, prohibits dismissal where, as in the instant case, a party to the action is a Florida resident. Houston v. Caldwell, 359 So.2d 858 (Fla. 1978); Sibaja v. Dow Chemical, 757 F.2d 1215. Thus, the crucial question of whether a district court sitting in diversity must follow the state or federal common law of forum non conveniens is ripe for review, and this Court's jurisdiction is warranted to finish Piper's exceptionally important task of bringing certainty to the law of forum non conveniens, and uniformity to the Erie doctrine.

2. Challenged rule is extreme and arbitrary.

The instant question is also exceptionally important because it challenges a rule which permits denial of the state constitutional right of a Florida resident to seek redress of injury in a Florida forum, or at least an American court, and does so on the purely fortuitous and arbitrary grounds of diversity of citizenship among parties.

VII. CONCLUSION.

For the foregoing reasons, Southwest prays this Court grant jurisdiction to resolve the question here presented.

MARK R. KOMRAY, Attorney of Record
for Southwest Water Wells, Inc.

TOM SMOOT, III

VIII. APPENDIX. Sup. Ct. R. 14.1(k).

A. Order delivered upon rendering judgment by the Eleventh Circuit Court of Appeals, whose decision is sought to be reviewed (March 10, 1993). Sup. Ct. R. 14.1(k)(i).

In the United States Court of Appeals for the Eleventh Circuit;
No. 92-2639
D.C. Docket No. 91-1381-CIV-T-21C

Southwest Water Wells, Inc., a Florida Corporation, Plaintiff-Appellant,	)
versus	)
Garney Companies, Inc., a Missouri corporation, individually, d/b/a Waugh/Garney Joint Venture; American Home Assurance Company, Defendants-Appellees.	)

Appeal from the United States District Court for the Middle District of Florida

March 10, 1993

Before ANDERSON and EDMONDSON, Circuit Judges and YOUNG*[Honorable George C. Young, Senior United States District Judge for the Middle District of Florida, sitting by designation.]

PER CURIAM: AFFIRMED. See Eleventh Circuit Rule 36-1.

B. Any other opinions, orders, findings of fact, and conclusions of law. Sup. Ct. R. 14.1(k)(ii).

1. "On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc" (May 20, 1993).

In the United States Court of Appeals for the Eleventh Circuit

No. 92-2639

D.C. Docket No. 91-1381-CIV-T-21C

Southwest Water Wells, Inc., a Florida Corporation, Plaintiff-Appellant,	)
versus	)
Garney Companies, Inc., a Missouri corporation, individually, d/b/a Waugh/Garney Joint Venture; American Home Assurance Company, Defendants-Appellees.	)

On Appeal from the United States District Court for the Middle District of Florida

On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc

Before ANDERSON and EDMONDSON, Circuit Judges and YOUNG* [Honorable George C. Young, Senior United States District Judge for the Middle District of Florida, sitting by designation.]

PER CURIAM: The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: /s/ UNITED STATES CIRCUIT JUDGE.

May 20, 1993.

2. "ORDER" (April 28, 1992).

United States District Court Middle District of Florida
Tampa Division

Case No. 91-1381-CIV-T-21(C)

Southwest Water Wells, Inc.,
a Florida corporation, Plaintiff,

v.

Garney Companies, Inc.,
a Missouri corporation,
individually and as joint venturer
doing business as Waugh/Garney
Joint Venture a join venture,
and American Home Assurance
Company, Defendants.

ORDER

Before the Court for consideration is the Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens, and, or in the Alternative, to Dismiss Pursuant to Rule 12(b)(7) for Failure to Join Indispensable Parties Under Rule 19 (Dkt. #17). The Court has reviewed the Defendants' memoranda and the Plaintiff's memoranda in opposition thereto, and is of the view that this action should be dismissed based on forum non conveniens.

FACTS

The Plaintiff's suit arises out of a construction subcontract to drill disposal wells in the Bahamas on behalf of the government of the Bahamas Water and Sewage Corporation ("Owner"). The Owner contracted with Waugh/Garney Joint Venture ("Waugh/Garney" or "joint venture"), a venture organized solely for the purpose of undertaking the project. Waugh is a corporation organized under the laws of the Commonwealth of the Bahamas, and Garney is a Missouri corporation. After entering into the contract with the Owner, Waugh/Garney subcontracted with the Plaintiff to perform the well drilling, well testing, and geophysical logging work as called for in the contract with the Owner. The contract and the related plans, specifications and other contract documents were incorporated by reference into the subcontract between Waugh/Garney and the Plaintiff.

In September, 1991, the Plaintiff filed a three count complaint against the Defendants in state court, alleging that it had not been paid on a timely basis for work performed and materials provided in connection with the project, and that it was entitled to additional payments for extra work and change and cancellation orders. In addition to the breach of contract count, the Plaintiff also alleged that the surety was obligated under the payment bond to pay for the work described in the contract. The Defendants timely removed the case to this Court and filed an answer and the Motion which is the subject of this Order.

FORUM NON CONVENIENS

The use of forum non conveniens "represents a reasoned attempt to apply ancient principles of the common law to the complicated international choice of law questions increasingly presented to district courts. It provides a workable

intellectual tool with which courts can attack these vexing jurisdictional questions, separating out for hearing only those cases where contacts with the American forum predominate." Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1519 n.10 (11th Cir. 1985). "Forum non conveniens dismissals are desirable because they obviate the need to engage in 'complex exercises in comparative law.'" Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981)). The Eleventh Circuit has stated that the use of the doctrine is to be favored. Sigalas at 1519 n.10.

In determining whether to decline to exercise jurisdiction under the doctrine of forum non conveniens, a district court must weigh the relative advantages and disadvantages of a trial in each forum, and consider public and private interest factors. C.A. La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983).

> As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. If the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that the plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

Id. (emphasis in original) (citing Pain v. United Technologies

Corp., 637 F.2d 775, 784-85 (D.C.Cir. 1980) cert. denied, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981)).

In considering the private interests of the parties, the trial court can factor the relative ease of access to the sources of proof; the ability to obtain witnesses; if relevant, the possibility of viewing the premises; and other considerations that make a trial easy, expeditious and inexpensive. Id. Public interests to be factored by the trial court include court congestion and the utilization of jurors to hear cases that are unrelated to the forum; the desirability of having local controversies heard locally; and the difficulties of resolving conflict of laws issues and applying foreign law. Id. The trial court should not give substantial weight to the consideration of whether the remedy in the alternative forum is less generous, unless the other nation's remedy is so inadequate that it is no remedy at all. Sigalas, 776 F.2d at 1519 (11th cir. 1985).

The list of considerations is not exhaustive or dispositive. The Court must balance each factor without placing controlling emphasis upon any one consideration, since flexibility is the essence of the doctrine of forum non conveniens. Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249, 102 S.Ct. 252, 262, 70 L.Ed.2d 419 (1981)).

ANALYSIS

Adequate Alternative Forum and Private Interest

In the case at bar, the Commonwealth of the Bahamas provides an adequate alternative forum which possesses jurisdiction over this matter. In fact, there are pending lawsuits in the courts in the Bahamas where all parties involved in this controversy are present.

[n.1. At the hearing of this Motion, the Plaintiff asserted that they are defendants in the pending lawsuits, and that it is more desirable to litigate this case as a plaintiff. This consideration alone, without more, is insufficient to avoid dismissal based on forum non conveniens.]

Since the construction project occurred in the Bahamas, many of the witnesses and documents are located there. Further, since the Plaintiff has already been named in a lawsuit in the Bahamas involving the same set of facts and issues that are present in the case at bar, its assertions that it would be easier to litigate the case in this forum are without merit. The Plaintiff's initial forum choice is also a factor which must be considered. However, the Plaintiff chose to initiate their cause of action in state court, and removal by the Defendants brought them to federal court. Therefore, in balancing the strong presumption against disturbing the Plaintiff's initial forum choice with other factors of private interest, the Court is of the view that this balance is near equipoise.

Public Interest

The public interest considerations point to the Bahamas as a more appropriate forum to determine the outcome of this action. The controversy arose out of a construction project in the Bahamas, and the outcome of this litigation will have a more direct impact on the residents in that forum than on the residents in this forum. While the Plaintiff is a Florida corporation, all of the other parties to this action are foreign to this jurisdiction. Thus, the desirability of having localized controversies decided at home is not a controlling factor. If this case was to be heard in this jurisdiction, this Court would face the arduous task of resolving conflict of law questions as well as applying foreign law.

In the hearing on this matter, the Defendants strenuously asserted that the risk of inconsistent verdicts was great since there are pending lawsuits in the Bahamian court involving the same parties and issues. The Court has considered that fact in weighing the private and public interests of dismissing the case based on forum non conveniens grounds. Accordingly, it is

ORDERED AND ADJUDGED that the Defendants' Motion is GRANTED and this case is DISMISSED.

DONE and ORDERED at Tampa, Florida this 28th day of April, 1992.

/s/Ralph W. Nimmons, Jr.
United States District Judge.

(2)

Supreme Court, U.S.
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No. 93-300

In The

Supreme Court of the United States

October Term, 1993

SOUTHWEST WATER WELLS, INC.,

Petitioner,

vs.

GARNEY COMPANIES, INC.,
WAUGH/GARNEY JOINT VENTURE
AND AMERICAN HOME ASSURANCE COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issue framed by petitioner is more accurately and succinctly stated as follows:

> Whether federal *forum non conveniens* law is to be applied by a federal court in a diversity action.

RULE 29.1 STATEMENT

No parent or subsidiary company for respondents Garney Companies, Inc. or Waugh/Garney Joint Venture is to be listed under Supreme Court Rule 29. American Home Assurance Company is a member company of American International Group, Inc.

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Mizokami Bros. of Arizona, Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) 7

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OTHER AUTHORITIES

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828 (2d ed. 1986) 3

ADDITIONAL STATEMENT OF CASE

While petitioner's statement of the case including the factual background and procedural background is accurate, petitioner fails to set forth the additional facts set forth below which provide a true and accurate back-drop to this case.

A. Factual Background

The controversy arose out of a construction project which Waugh/Garney Joint Venture ("Joint Venture") had contracted with the Bahamian government to perform in the Bahamas. (Pet. A. 13). The subcontract between petitioner and the Joint Venture states that the law of the Bahamas would govern any dispute. (Pet. A. 16). Further, petitioner and the Joint Venture are already parties in a lawsuit in the Bahamas involving the same set of facts and issues involved in this lawsuit. (Pet. A. 16).

B. Procedural Background

The Joint Venture filed a Motion to Dismiss petitioner's complaint based upon grounds of *forum non conveniens,* and because of petitioner's failure to join an indispensable party – The Commonwealth of the Bahamas Water and Sewerage Corporation, the owner. (Pet. A. 12). The District Court dismissed on the basis of *forum non conveniens* (Pet. A. 12) and thus did not reach the indispensable party issue. The failure to join an indispensable party may also prevent petitioner from proceeding in the United States. The Eleventh Circuit affirmed

the District Court's decision in a per curiam decision. (Pet. A. 9).

SUMMARY OF ARGUMENT

Petitioner alleges a conflict between circuits which does not exist. The case it cites in conflict, *Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945), did not decide whether federal law applied under the doctrine of *forum non conveniens* in a diversity case. As a result, *Weiss* does not conflict with the First, Fifth and Eleventh Circuits which have decided this issue uniformly.

The Eleventh Circuit case on the issue, *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), is consistent with the Supreme Court cases cited by petitioner. The Supreme Court cases deal with service of process and statute of limitations. *Hanna v. Plumer*, 380 U.S. 460 (1965) (allowing service of process pursuant to the federal rules in a diversity action); *Guaranty Trust v. York*, 326 U.S. 99 (1945) (finding that a state statute of limitations was substantive thus requiring the federal court to use the state rule in a diversity case). Neither case involves application of the law of *forum non conveniens*. In resolving the *forum non conveniens* question, *Sibaja* cited and correctly applied both the *Hanna* and *Guaranty* decisions.

The three circuits deciding the issue have uniformly applied federal *forum non conveniens* law in diversity cases and this is not a matter of extreme importance

requiring the Court's attention. The leading commentators on practice and procedure – Wright & Miller, endorse this principle and state that *Sibaja* was a "good" decision.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT BETWEEN CIRCUIT DECISIONS ALLEGED BY PETITIONER DOES NOT EXIST

Petitioner alleges that the decisions in *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) and *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated sub nom., Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989) conflict with the 1945 Second Circuit decision in *Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945).

Sibaja, 757 F.2d at 1219 and *In re Air Crash Disaster*, 821 F.2d at 1159 held that the interests of the federal forum in self-regulation, in administrative independence and in self-management require applying federal *forum non conveniens* law in diversity cases. Although petitioner claims *Weiss* conflicts with these decisions, the Second Circuit in *Weiss* did not address whether federal *forum non conveniens* law is to be applied by a federal court in diversity cases. Instead, *Weiss* decided whether a federal court in New York could apply New York law to resolve a dispute concerning the internal affairs of a Virginia corporation. The case dealt only with whether Virginia or New York law would apply, not with any conflict between federal and state law. The Second Circuit held that the New York court was an improper forum to

decide a dispute concerning the internal affairs of a Virginia corporation. The court stated nothing about the applicability of state versus federal law of *forum non conveniens* in a diversity case. *Weiss*, therefore, does not conflict with the *Sibaja* and *In re Air Crash Disaster* decisions.

Petitioner also does not cite the Second Circuit decision which does discuss whether state or federal *forum non conveniens* law applies in a diversity case. In *Schertenleib v. Traum*, 589 F.2d 1156, 1162 n.13 (2d Cir. 1978), the court stated that the issue was undecided in the Second Circuit and further noted that a decision was not necessary because New York state law and federal law were the same. This is a further indication that the "conflict" alleged by petitioner regarding *forum non conveniens* law was not present in *Weiss*.

Thus, there is no conflict on this precise issue between the circuits. All circuit courts that have decided the issue (First, Fifth and Eleventh) are uniform in their decisions that federal law rules govern the *forum non conveniens* analysis in a diversity case. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 n.11 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991); *Royal Bed & Spring Co. v. Famossul Industria*, 906 F.2d 45, 50 (1st Cir. 1990); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987), *vacated sub nom., Pam Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chemical*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

II. THE ELEVENTH CIRCUIT DECISION IN *SIBAJA* DOES NOT CONFLICT WITH THE SUPREME COURT'S *HANNA* DECISION

Petitioner attempts to portray a conflict between the Eleventh Circuit decision in *Sibaja* and the Supreme Court decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). No such conflict exists.

Hanna involved whether the service of process of an executor was governed by federal or state law in a diversity action. The Supreme Court held that service of process pursuant to federal rules did not violate *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and further held that the federal rules applied to the adequacy of service in a diversity case. This case had nothing to do with the application of the *forum non conveniens* doctrine, except to provide further support for the principle that matters pertaining to the administration of federal courts are controlled by federal law.

Petitioner also cites *Guaranty Trust v. York*, 326 U.S. 99 (1945). *Guaranty* did not involve the application of the *forum non conveniens* doctrine. The Supreme Court in *Guaranty* held that the state statute of limitations was a rule of decision that a federal court must apply in a diversity case. The doctrine of *forum non conveniens*, however, "is a rule of venue, not a rule of decision." *Royal Bed & Spring Co.*, 906 F.2d at 50 (citing *Sibaja*, 757 F.2d at 1219). Because the doctrine operates as a procedural rule rather than a state substantive rule of law, application of federal law does not violate *Erie*.

The *Sibaja* decision does not conflict with the holdings in either Supreme Court decision cited by petitioner.

In fact, *Sibaja* cited both *Hanna* and *Guaranty* and followed the principles set forth in those decisions. *Sibaja*, 757 F.2d at 1219.

III. THIS QUESTION IS NOT A MATTER OF EXCEPTIONAL IMPORTANCE REQUIRING THE COURT'S ATTENTION

The per curiam opinion by the Eleventh Circuit in this case is consistent with all circuit decisions to have addressed the issue. *See Nolan, Royal Bed & Spring Co., In re Air Crash Disaster* and *Sibaja*. Furthermore, Wright & Miller, the leading commentators on practice and procedure, endorse the holding in *Sibaja* that federal law controls. 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3828 at 194 (2d ed. 1986). They state that "it seems quite clear" that federal courts are not bound by state *forum non conveniens* law because "these are matters of the administration of the federal courts, not rules of decision, so that state rules cannot be controlling." *Id.* Because the issue has been clearly decided and there are no conflicting decisions, this is obviously not a matter of extreme importance requiring the Court's attention.

This Court denied *certiorari* on the identical issue in both *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) and *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991). All circuits to address the issue – the Eleventh Circuit in *Sibaja*, the Fifth Circuit in *In re Air Crash Disaster* and *Nolan*, and the First Circuit in *Royal Bed & Spring*

Co. – have decided the issue consistently. All these circuits hold that federal law should be applied in addressing *forum non conveniens* questions in diversity cases.

Petitioner finally asserts that this case presents an exceptionally important question because of a Florida constitutional issue. Petitioner apparently maintains that the Florida constitutional provision that its courts "shall be open to every person" creates an absolute right to gain redress in the courts. Petitioner cites no Florida Supreme Court or federal court decision that has ever found this provision to affect the *forum non conveniens* analysis. The Florida Constitution clearly does not give an unfettered right to its courts as it cannot prevent removal and does not affect the administration of federal courts as set forth in *Sibaja*, 757 F.2d at 1215. Respondent respectfully submits that this constitutional claim is a non-issue and not an exceptionally important issue requiring the Court's attention. Furthermore, the court in *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), keenly observed that a United States citizen who chooses to engage in international transactions should know that when foreign operations lead to litigation, it cannot always expect to bring suit in the United States when the site of litigation should be elsewhere.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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